

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHONG YE DACANAY
Claimant

VS.

E.D.P. ENTERPRISES INC.
Respondent

AND

BUSINESS INSURANCE CO.
Insurance Carrier

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Docket No. 265,115

ORDER

Respondent requested Appeals Board (Board) review of Administrative Law Judge (ALJ) Bryce D. Benedict's April 23, 2002, Award. The Board heard oral argument on October 2, 2002. Board Member Gary M. Peterson recused himself from the proceeding and Stacy Parkinson was appointed Board Member Pro Tem.

APPEARANCES

The claimant appeared by her attorney, Jeff K. Cooper of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, John D. Jurcyk of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant a permanent total disability as a result of a low back injury she suffered on March 26, 2000, while employed by the respondent. The ALJ also found claimant was a full-time employee at the time of her accident for a pre-injury average weekly wage of \$480.80. Additionally, the ALJ found claimant's work-related low back injury resulted in claimant suffering a 20 percent permanent functional impairment.

On appeal, respondent contends the more persuasive evidence contained in the record proves claimant retains the ability to perform sedentary employment and has not looked for any type of employment since her injury. Accordingly, respondent argues the ALJ's Award should be modified to a 63 percent permanent partial general disability based on a work disability. Respondent also argues the record establishes claimant was employed by respondent as a part-time employee with a pre-injury average weekly wage of \$276.46. Furthermore, respondent argues claimant failed to prove any permanent functional impairment because she failed to provide respondent with Dr. Sergio Delgado's 20 percent functional impairment report within 15 days after his examination of claimant as required by K.S.A. 44-515(a) (1993 Furse).

Conversely, claimant requests the Board to affirm the Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

The Board finds the ALJ's Award entitling claimant to a permanent total disability should be affirmed. The Board agrees with the ALJ's analysis of the evidence as set forth in the Award. Accordingly, the Board adopts those findings and conclusions set out in the Award as if specifically set forth in this Order. In particular, the Board agrees that claimant's testimony, Dr. Delgado's permanent restrictions, and vocational expert, Monty Longacre's opinions are persuasive and prove that claimant's low back injury has rendered her "permanently and totally" disabled because she is "essentially and realistically" unemployable.¹

Orthopedic surgeon, Dr. Delgado, was the only physician to testify in this case. Dr. Delgado expressed opinions on claimant's permanent functional impairment, permanent restrictions and claimant's loss of work task performing ability. In accordance with the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), Dr. Delgado opined that as a result of claimant's work-related low back injury she had a 20 percent permanent partial functional impairment. The respondent objects to the admissibility of Dr. Delgado's functional impairment rating on the basis that claimant failed to timely provide respondent with the rating. The respondent cites K.S.A. 44-515(a) (1993 Furse) as requiring claimant to provide the respondent with Dr. Delgado's functional impairment opinion within 15 days after his examination of claimant. K.S.A. 44-515(a) (1993 Furse) provides in part:

The employer or the insurance carrier of the employer of any employee making claim for compensation under the workers compensation act shall be

¹ See *Wardlow v. ANR Freight Systems*, 19 Kan. App.2d 110, 113, 872 P.2d 299 (1993).

entitled to a copy of the report of any health care provider who has examined or treated the employee in regard to such claim upon written request to the employee or the employee's attorney within 15 days after such examination or treatment, which report shall be identical to the report submitted to the employee or the employee's attorney.

The Board disagrees with respondent's objection. First, Dr. Delgado's only written report was the report dated May 24, 2001, which included the results of his examination of claimant on that date. Second, Dr. Delgado's permanent functional impairment rating was not contained in a written report but was provided during his deposition testimony based on his May 24, 2001, examination of claimant. Third, K.S.A. 44-515(a) (1993 Furse) requires the employer or its insurance carrier to make a written request to the employee or the employee's attorney before the employee is obligated to supply a report of the health care provider within 15 days after such examination or treatment. Here, Dr. Delgado's functional impairment rating was never contained in a report and respondent did not request the impairment rating from the claimant. The Board finds respondent's objection to the admissibility of Dr. Delgado's functional impairment rating opinion is overruled. Accordingly, the Board affirms the ALJ's finding that claimant suffered a 20 percent permanent functional impairment as a result of her low back injury.

The final issue on appeal is claimant's pre-injury average gross weekly wage. There is no dispute in the record that claimant was earning \$12.02 per hour on her March 26, 2000, accident date. The ALJ found claimant proved she was employed by respondent as a full-time employee with an ordinary 40-hour work week for an average weekly wage of \$480.80.² But respondent argues the record established claimant was employed as a part-time employee. Accordingly, claimant's average weekly wage is determined by the gross amount of money claimant earned during the 26-calendar weeks immediately preceding her accident date, divided by 26 plus the employee's average weekly overtime and any additional compensation. The work week does not include weeks the employee was on vacation, leave of absence, sick leave, or was absent the entire work week because of illness or injury.³ Based on claimant's wage statement admitted into the record, respondent argues claimant's pre-injury average weekly wage was \$276.46.⁴

The Board agrees with the ALJ's finding that the claimant was employed by respondent as a full-time employee. At the time of her March 26, 2000, accident, claimant had been employed by respondent since January 6, 1992. Claimant testified she was a

² K.S.A. 44-511(a)(5); K.S.A. 44-511(b)(4)(B).

³ K.S.A. 44-511(a)(4); K.S.A. 44-511(b)(4)(A).

⁴ Randall Depo., Ex. 2.

full-time employee of respondent.⁵ Respondent's project manager, Regina Randall, testified that \$1.67 of claimant's \$12.02 hourly rate was to compensate claimant for health and welfare benefits because she elected not to enroll in respondent's medical insurance program.⁶ Ms. Randall was also asked if claimant was a full-time employee. Ms. Randall replied, "Yes."⁷

Although the Board agrees claimant was employed by respondent as a full-time employee, the Board finds the evidence proved claimant was an employee in an employment situation where the employees are considered full-time, regardless of the number of hours worked per week.⁸ Here, the claimant established through Ms. Randall's testimony that she was scheduled to work every other weekend. The weeks claimant worked on the weekends, she would work an average of 34 hours per week. During the weeks she did not the work the weekends, claimant would average between 24 and 28 hours per week.⁹ That resulted in an average of 30 hours per week. Claimant's wage statement for the hours claimant worked preceding the week ending March 25, 2000, to the week ending October 2, 2000, or a 26-week period, showed claimant averaged 30.39 hours per week for the 19 full weeks she worked during that period.¹⁰ The Board concludes Ms. Randall's testimony and claimant's wage statement admitted into the record proves claimant was employed by respondent as a full-time employee regularly working a 30-hour work week. The Board finds the 30-hour work week times \$12.02 per hour, the hourly rate she was earning on the date of her accident, computes to a \$360.60 average weekly wage. Accordingly, claimant's permanent total disability award will be calculated based on a \$360.60 average weekly wage and a compensation weekly rate of \$240.41.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Bryce D. Benedict's April 23, 2002, Award, should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Chong Ye Dacanay, and against the respondent, E.D.P. Enterprises, Inc., and its insurance carrier,

⁵ R.H. Trans. at 16.

⁶ Randall Depo. at 7-8.

⁷ Id. at 10-11.

⁸ See K.S.A. 44-511(a)(5).

⁹ Randall Depo. at 23.

¹⁰ Id., Ex. 2.

Business Insurance Company, for an accidental injury which occurred on March 26, 2000, and based upon an average weekly wage of \$360.60.

Claimant is entitled to 36.43 weeks of temporary total disability compensation at the rate of \$240.41 per week or \$8,758.14, followed by \$116,241.86 of permanent total disability compensation to be paid at the rate of \$240.41 per week until paid in full, making a total award of \$125,000.

As of March 31, 2003, there is due and owing claimant 36.43 weeks of temporary total disability compensation at the rate of \$240.41 per week or \$8,758.14, followed by 120.71 weeks of permanent total disability compensation at the rate of \$240.41 per week in the sum of \$29,019.89, for a total of \$37,778.03, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$87,221.97 is to be paid at the rate of \$240.41 per week, until fully paid or further order of the Director.

The Board adopts the remaining orders contained in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of April 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation